

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 31834/1993

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

22 May 2025

In the matter between:

**MOGUDI BATSILE MOSAI – IN HER PERSONAL CAPACITY
AND IN HER CAPACITY AS EXECUTRIX OF LATE HOWARD MESHACK
MOGUDI** **APPLICANT**

and

STANDARD BANK OF SOUTH AFRICA LIMITED **FIRST RESPONDENT**

TSHENOLO VICTORIA MONAAPULA **SECOND RESPONDENT**

THE REGISTRAR OF DEEDS **THIRD RESPONDENT**

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email and by upload to Case Lines. The date and time for hand down is deemed to be 10h00 on 22 May 2025

JUDGMENT

S.VAN NIEUWENHUIZEN, AJ

Introduction

[1] This matter came before me on 27 November 2024 in the opposed motion court. The applicant seeks the following relief:

- “1. Condonation for the late filing of this application, if necessary.
- 2 Setting aside of the judgment granted under case number 31834/93, against the applicants' and in favour of the first respondent.
3. Setting aside of such portion of the judgment under case number 31834/93 dated 18 January 1994 declaring the property executable.
4. Declaring the applicant to be the lawful owner of the immovable property located at Erf 1[...], Orlando West, bearing physical address 1[...] M[...] Street, M[...], O[...], D[...], Soweto ("the property").
5. Directing the Third Respondent to forthwith do all things necessary to re-register and transfer the property into the name of the applicant.
6. That any person opposing the relief sought herein be ordered to pay the costs of this application.
7. Further and or alternative relief.”

[2] For the sake of convenience the applicant will be referred to as “the executrix”, the first respondent as “the bank”, the second respondent as “Ms Tshenolo” and the third respondent as “the Registrar”. The late Howard Meshack Mogudi will be referred to as the “deceased”. It should be borne in mind that the executrix is also before the court in her personal capacity.

[3] From the founding affidavit it appears that the application is brought under rule 42 (1) alternatively under Rule 31(2)(b) of the Uniform Rules of Court. The relief was instituted on 25 June 2015.

Background

[4] The deceased and the executrix were married in community of property during 1982. On the papers before me the exact date of marriage and the consequences of the marriage was in dispute and gave rise to several affidavits being filed and experts called upon to express their views on the marriage certificate(s) that were filed. These disputes came to nought when the bank agreed to have the matter adjudicated on the basis that the executrix and the deceased were married in community of property with the usual consequences of such a marriage setting in (more about this will follow later) and also informed me via their joint practice note that it is common cause that the deceased and executrix were so married.

[5] Although nowadays academic, it should be remembered that during the apartheid regime a marriage between a black woman and a black man was taken to be out of community of property unless the parties made a declaration to the contrary to the marriage officer at least 1 month prior to the marriage itself. This was due to the consequences of the Section 22(8) of the Black Administration Act 38 of 1927 which has since been repealed by Act 28 of 2005 and which Act has as date of commencement 12 April 2006. In terms of section 1(4) of this Act sections 22(7) and 22(8) of Act 38 of 1927 is

“.....hereby repealed on-

(a) 30 September 2007; or

[Para. (a) amended by [s. 1 of Act 8 of 2006](#) (wef 30 July 2006).]

(b) such date as national legislation to further regulate the matters dealt with in section 22 (7) and (8) of the Act is implemented, whichever occurs first.”

[6] The preamble to Act 8 of 2006 serves as an apt reminder of the consequences of this act for black people and is worth repeating:

“SINCE the Constitution of the Republic of South Africa, 1996, as the supreme law of the Republic, was adopted so as to-

- establish a society based on democratic values, social and economic justice, equality and fundamental human rights;
- improve the quality of life of all citizens; and
- free the potential of each person by every means possible;

AND SINCE the Black Administration Act, 1927 (the Act), is regarded as a law that-

- is repugnant to the values set out in the Constitution, particularly section 1 and the Bill of Rights in Chapter 2 thereof;
- is reminiscent of past divisions and discrimination; and
- ought to be repealed as a matter of the utmost urgency;

AND SINCE the repeal of some provisions of the Act, in the interests of legal certainty and good governance, necessitates the incremental approach adopted hereunder, by repealing those provisions of the Act requiring legislative alternatives on a fixed and reasonably foreseeable future date or on such date as the legislative alternatives are implemented by the role players in question, whichever occurs earlier,

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:”

[7] The deceased acquired a grant of leasehold from the Soweto City Council on 25 July 1991.

[8] Around July 1991 the deceased mortgaged the property to the bank in order to fund a business venture. The executrix did not sign any bond documents or sign any transfer documents despite the marriage in community of property. The bank admits this. This was done in contravention of section 15(2)(a) and (b) of the Matrimonial Property Act 88 of 1984 (“the MPA”) which reads as follows:

“15 Powers of spouses

(1) Subject to the provisions of subsections (2), (3) and (7), a spouse in a marriage in community of property may perform any juristic act with regard to the joint estate without the consent of the other spouse.

(2) Such a spouse shall not without the written consent of the other spouse-

(a) alienate, mortgage, burden with a servitude or confer any other real right in any immovable property forming part of the joint estate;

(b) enter into any contract for the alienation, mortgaging, burdening with a servitude or conferring of any other real right in immovable property forming part of the joint estate;”

[9] Sections 15(4) and (5) of the MPA read as follows:

“(4) The consent required for the purposes of paragraphs (b) to (g) of subsection (2), and subsection (3) may, except where it is required for the registration of a deed in a deeds registry, also be given by way of ratification within a reasonable time after the act concerned.

(5) The consent required for the performance of the acts contemplated in paragraphs (a), (b), (f), (g) and (h) of subsection (2) shall be given separately in respect of each act and shall be attested by two competent witnesses.”

[10] The business venture failed and as a consequence the deceased fell into arrears with the mortgage repayments.

[11] On 23 November 1993 the bank issued summons against the deceased (without citing or serving same on the executrix) and on 18 January 1994 Cloete J granted default judgment against the deceased in the following terms:

“ 1. Payment of the sum of R109 011,49.

2. Interest on the sum mentioned in paragraph 1 at the rate of 16 % per annum from 1st November 1993 to date of payment such interest to be calculated on daily balance and capitalised monthly in arrear.

3. An order declaring all right title and interest in and to the leasehold in respect of ERF 1[...], O[...] W[...] mortgaged under mortgage bond no: B[...] dated 23 September 1991 executable for the said sums.

4. Attorney and client costs.”

[12] According to the executrix neither she nor the deceased received any summons from the bank. The executrix is adamant if it was served on the deceased she would have been made aware thereof. She also annexes a copy of the Sheriff's return of service which asserts that the summons was served on Mrs Lethollo, a person who is unknown to her.

[13] The aforesaid took place prior to the 1994 Interim Constitution, Act 200 of 1993 (“the interim Constitution) coming into operation.

[14] The bank thereafter purchased the property in execution on 7 September 1994 for the paltry amount of R200. An unhealthy practice which was particularly rife amongst banks at the time. By then the interim Constitution was in effect as of 27 April 1994.

[15] Section 28 of the interim Constitution reads as follows:

“28 Property

(1) Every person shall have the right to acquire and hold rights in property and, to the extent that the nature of the rights permits, to dispose of such rights.

(2) No deprivation of any rights in property shall be permitted otherwise than in accordance with a law.

(3) Where any rights in property are expropriated pursuant to a law referred to in subsection (2), such expropriation shall be permissible for public purposes only and shall be subject to the payment of agreed compensation or, failing agreement, to the payment of such compensation and within such period as may be determined by a court of law as just and equitable, taking into account all relevant factors, including, in the case of the determination of compensation, the use to which the property is being put, the history of its acquisition, its market value, the value of the investments in it by those affected and the interests of those affected.”

[16] Neither the deceased nor the executrix were notified about the sale in execution and they continued to live on the property with their children in free and undisturbed possession.

[17] The PIE Act 19 of 1998 (“PIE”) which bolsters the section 26 rights in the Constitution pertaining to the right to housing which i.a. prevents arbitrary eviction and gives effect to judicial oversight in matters of eviction in the meantime came into effect on 5 June 1998. This became important to the executrix and deceased in the litigation with Ms Tshenolo but seems to be of no help with the present litigation.

[18] On 6 December 2001 Servcon Housing Solutions (“Servcon”) purporting to act on behalf of the bank contacted the executrix and requested her to sign a lease

agreement with the bank in respect of the property. She signed same on the instructions and advice of the deceased who was in Kenya at the time. She was unaware of the significance of the document. A letter dated 18 December 2001 was addressed to her to the effect that the bank accepted the lease agreement and that a monthly rental is payable of R904.00 from 1 February 2002. She was also provided with a copy of the lease agreement.

[19] According to the executrix it was her understanding that if they continued to make payments to the bank the property would remain theirs. It was suggested in argument that the executrix is not illiterate and educated and should have known something is amiss by the latter date. By 2007 she was studying towards a master's degree in chemistry. In my view it is highly unlikely that any earlier scientific studies would have conferred upon her any legal knowledge. While the reasonable person may have been suspicious about the Servcon lease I have no reason to suspect that she had any comprehension of the legal position under the MPA, the Interim Constitution, or the lease until such time as she and her husband was advised by Fluxman's attorneys about their legal rights in 2007.

[20] Notwithstanding the aforesaid position they continued to make improvements to the property in excess of R100 000 and the value of the property increased to approximately R450 000. The bank disputes these improvements in the absence of documentation.

[21] Unbeknown to the deceased and the executrix and on 17 September 2002 the bank sold the property to Ms Tshenolo for the sum of R50 000. Registration and transfer in her name took place on 11 May 2004. A copy of the Title Deed is annexed as "**BMM12**".

[22] Prior to the registration of transfer and on 29 May 2003 Ms Tshenolo commenced with eviction proceedings against the deceased under case number 95536/04. Without withdrawing these proceedings a second summons was issued on 4 August 2004. Ms Tshenolo applied for default judgment during August/September 2004 but as a result of her failure to comply with the provisions of PIE the application was initially refused.

[23] Upon being “served again” in July 2005 the deceased managed to raise funds and instructed Mills and Groenewald to defend the matter which was then postponed on numerous occasions. Ultimately the executrix and the deceased was unable to fund the matter further and their attorney withdrew and on 2 May 2006 an eviction order was granted.

[24] On 6 November 2007 the deceased and executrix were evicted from the property. As a consequence they consulted Fluxman’s Inc. who launched an urgent application under case number 29102/07 against Ms Tshenolo and the Sheriff. In this matter the executrix and deceased sought to obtain possession of the property pending an application/action against the bank, A copy of the Notice of Motion is annexed as “**BMM 13**”.

[25] The application was struck from the roll for lack of urgency by Moshidi J but the deceased and the executrix was nevertheless restored in possession of the property pending finalisation of the matter.

[26] Under the rubric “**CONDONATION AND REASONS FOR DELAY IN LAUNCHING THE APPLICATION**” the executrix explains that she was advised that for purposes of rule 42 (2)(a) (later corrected to read as rule 42(1)(a)), there is no time period to launch an application of this nature. She states that she was nevertheless advised that such an application may not be successful where an applicant has delayed seeking a rescission or acquiesced in the execution of the judgment. In light of the lengthy period since the granting of judgment, her and the deceased’s subsequent knowledge thereof and the time frame of the present application she believes an explanation is necessary in order for the Court have a better understanding of her position.

[27] She further states in as much as reliance is placed on rule 31(2)(b) an application to set aside the judgment upon good cause being shown ought to have been brought within 20 days of deceased and her having knowledge of same. She states that although she was aware that summons had been issued she was not aware of the fact that the bank had obtained judgment. She further states that she

and the deceased only became aware in December 2001 that the bank in fact purchased the property in 1994.

[28] They continued to live on the property for several years thereafter and did not receive any documents pertaining to a sale in execution of the property.

[29] It was only in 2007 and after consulting with Fluxman's Inc. who obtained all the relevant information that the executrix and the deceased learned that she had in fact signed a lease agreement and it became apparent that the lease agreement is still in force as it had not been cancelled despite the sale of the property to Ms Tshenolo.

[30] She states that only after she and the deceased were after 23 years evicted from the property did they understand the severity of the matter. The deceased's sister took a loan from Absa Bank and the executrix was assisted by her mother so that they could brief Fluxman's Inc.

[31] At this stage the deceased was already gravely ill. He was in and out of hospital from January 2007 until his death in October 2013. The executrix points out that they were dependent on government hospitals and even so R20 000 was required for dialysis treatment. The hospital records are extensive and annexed marked "**BMM15 - 17**" but are for all practical purposes illegible. Some hospital accounts are annexed marked "**BMM 18**" but I could find no diagnosis reflected thereon. Some of the legible dates on these accounts supports the executrix's version. She attached proof that a medical aid i.e. Bonitas Medical Aid was obtained for the deceased. This is marked as Annexure "**BMM 19**" There is only mention of a parent by the name of "Howard Meshack" with a birth date of 28 February 1950 which corresponds with that of the deceased. "Howard Meschack's" membership was subject to excluded conditions of "Hypertension" and "Renal and Urethral Disorder" each with a "Start Date" and "End Date" of "1/12/2012" and "30/11/2013". This broadly ties in with the executrix's description of the deceased being in and out of hospital. The pattern of hospitalisation and treatment fits a patient who suffers from kidney failure due to hypertension and ultimately require dialysis. I would have expected an attempt to produce a "fair typed copy" of the illegible hospital

documents to assist the executrix in her allegation that between 2007 and 2013 all the efforts went into getting the deceased well.

[32] On 29 August 2013 (before the deceased's death on 5 October 2013) Ms. Tshenolo pursued an application to confirm the validity of the eviction order granted at the Johannesburg Magistrate's Court together with an order for the eviction of the deceased and the executrix. This application was granted on 23 April 2014 (after the death of the deceased). To date this order has not been executed.

[33] At the time the deceased and the executrix appointed an attorney by the name of Mr Morare to deal with the matter. After he was paid his legal fees the executrix was pre-occupied by the critical medical condition of the deceased and relied on Mr Morare to attend to the matter. It is clear from the executrix's replying affidavit that her husband could no longer afford Fluxman's fees.

[34] After no feedback was received from Mr Morare for a long time she and the deceased consulted with Mr Mathopo from Mathopo attorneys who advised that the matter is too complicated and that he could not assist. By this time the deceased could not travel easily and was very sick. The executrix and her son thereafter approached numerous other attorneys who were all reluctant to take on the matter as it was complicated and complex.

[35] She even approached the Constitutional Court and the Public Protector and was never contacted after giving her details as requested. She and the deceased was never referred to pro bono organisations or legal aid clinics.

[36] She submits that she and the deceased were not in wilful default. Despite the fact that judgment was granted in 1994 the procedural defects only came to their attention in 2007. Between 2003 and 2014 she and the deceased were embroiled in litigation with Ms Tshenolo and in the process the deceased passed away.

[37] She was only appointed as executrix in the deceased's estate on 17 February 2014.

[38] The time period that elapsed until the present application for rescission was launched on 30 June 2015 is not fully explained. Given the picture presented i.e. of a long struggle with the deceased's illness with concomitant expenditure and inability to obtain pro bono legal assistance it suggests that funding may again have been the cause of the delay coupled with the intricacies of administering the deceased's estate and obtaining all the medical records and documents to launch the present application for rescission.

[39] There is no evidence to indicate that the intention to obtain the rescission relief against the bank was abandoned or waived in this period.

[40] She points out that should the application not be allowed she will suffer severe prejudice in that she would lose the home they stayed in for 23 years and built from scratch and even improved. The executrix is at present a single parent who is still studying and have two children. Her son Modlei is currently studying at Soweto College for Civil Engineering. Her daughter of 33 years is currently the only breadwinner and is employed full-time and is also studying for a B.Com degree. Her eldest son of 36 years is unemployed and resides with his wife and two children with the executrix. She also helps support her other son's granddaughter.

[41] The executrix is studying for a PHD degree at the University of Johannesburg on a bursary and is also a tutor on a part-time basis. At all earlier times before her husband's death the litigation against Ms Tshenolo was funded by her husband.

[42] She firmly believes that on a proper and full adjudication and hearing of the matter it will be clear that to not grant the relief would be wrongful and unlawful.

[43] She believe that the judgment was erroneously sought and granted in that an irregularity occurred given that she was not cited as co-owner of the property. Thus it was not legally competent for the court to have granted default judgment and to have declared the property executable. In addition she believes that her section 26(3) Constitutional right not to be evicted from her home until a Court has considered all relevant circumstances have been violated. I am not satisfied that the aforesaid

arises in the relief sought against the bank but accepts that she subjectively believed that the Constitution afforded her some protection against the conduct of the bank.

[44] On the aforesaid grounds she seeks a rescission of the judgment. It is clear that the effect of Chapter 111 of the MPA and the fact that she was from the outset married in community of property with all the usual consequences affected the citation, judgment and the execution process. Given the effect of Chapter 111 of the MPA questions arise whether the bank ever acquired ownership in the execution process as a bona fide purchaser and subsequently passed any valid ownership to Ms Tshenolo.

[45] Should her case not meet the requirements of rule 42 she relies on Uniform Rule 31(2)(b). In this regard she submits that she has to provide a reasonable explanation for her and the deceased's default, the application must be bona fide and not made to merely delay the claim of the bank and she must show that she has a bona fide defence to the claim. She submits that if the summons was served on her and she was cited as a defendant she would have taken every possible measure to protect her interest.

[46] She also refers to the title deed annexed as "**BMM 10**" wherein according to the bank it appears that her marriage to the deceased did not have the legal consequences of a marriage in community of property. She states that position to be patently false given the facts disclosed above which are now common cause in terms of the joint practice note. She further states that the judgment obtained by the bank is patently defective in that she was not joined to the proceedings as a party despite being a co-owner of the property having a direct and substantial interest therein.

[47] She further contends that in the eviction proceedings launched by Ms Tshenolo she was again not joined as co-owner and occupier of the property. In these proceedings Ms Tshenolo falsely alleged that she (Ms Tshenolo) was owner of the property as of May 2003. This is contradicted by the title deed annexed marked "**BMM12**". Apparently the bank sold the property to Ms Tshenolo on 17 September 2002.

[48] It is alleged that the latter bought more than one home under similar circumstances. Ms Tshenolo produced proof that she was entitled to purchase the property in terms of permission obtained from the South African Reserve Bank attached as “**BMM20**” This letter is dated 14 March 2003 and in contradiction to the date of the power of attorney referred to in “**BMM12**”. It is therefore alleged to be tainted. In this regard I am referred to section 91(2)(b) of the Banks Act 94 of 1990 which seem to have read at all relevant times as follows:

“(2) A director or employee of a bank or controlling company who, or any company in which such director or employee has a direct interest and which-

(a) accepts from any person any benefit for or in connection with any advance granted by that bank or by the bank in respect of which that controlling company is registered; or

(b) otherwise than with the written consent of the Authority or at a duly advertised public auction purchases any immovable property owned by or mortgaged to that bank or the bank in respect of which that controlling company is registered, and which is sold by or at the instance of the bank in question or is sold at a judicial sale at the instance of any other person, shall be guilty of an offence.”

with the exception of the word “Authority” which found its way into the Banks Act due to section 290 of Act 7 Of 2017 with effect 1 April 2018. Prior thereto the section referred to “the Registrar”.

[49] The bank filed an answering affidavit denying that the consequences of the marriage were that the parties were married in community. It denied that executrix is entitled to relief in terms of Uniform Rule 42 or Uniform Rule 31(2)(b). It took the stance that a long period of time has elapsed since the judgment was taken, that there is no proper explanation of the delay and that the executrix was in wilful default having known about the lease agreement since 2007 and took the stance that no good cause was made out for setting the default judgment aside. It also annexed the affidavit the deceased filed in support of the urgent application to be restored to the property after Ms Tshenolo obtained an eviction order. The deceased explains herein that in his understanding the lease agreement would only operate until the debt to the bank is paid whereafter the property would be his. He also drew attention

to certain improvement “liens” which he submitted could be enforced against Ms Tshenolo.

[50] The bank has no records pertaining to the execution of the judgment given that the executrix waited 21 years to launch the present application or at least 14 years after the sale came to her knowledge on 6 December 2001. It in any event states that the sheriff would not have proceeded with the sale in execution in 1994 had there been any defects in the execution process. No explanation is proffered for the paltry price paid by the bank for the property.

[51] The executrix filed a replying affidavit in principle reiterating her stance.

[52] She explains that her husband was in Kenya when Servcon prepared the lease agreement in her name and requested her to sign it. She states that she was unaware of its significance and signed it on the instruction and advice of her husband.

[53] She reiterates that she is a layperson and have no legal training or experience in the legal field.

[54] She was unaware during 2001 that a judgment had been taken in the matter and points out that no judgment has been taken in her personal capacity.

[55] She is unaware as to when the deceased got notice of the judgment but nevertheless ventures the opinion that it came to his knowledge in 2007 when Fluxman’s was instructed to bring the urgent application.

[56] She understood that once the indebtedness to the bank had been discharged the property would be re-transferred to the deceased and her. The latter is her response to the allegation made by the bank that the executrix is well-educated and the contents of the lease agreement is clear and unambiguous and to allege that she only became aware the document she signed was a lease agreement, when the consultation with Fluxman’s was held, is disingenuous. I do not find it disingenuous at all.

[57] She is of the view that she should also have been cited by the bank from the outset.

[58] It is not necessary to deal with the bank's expert witnesses due to the concession ultimately made by the bank as to the consequences of the marital regime. Ultimately the bank sought and obtained leave to file a further Supplementary Affidavit. This was due to conflicting expert reports and the decision in *AS and Another v GS and Another 2020 (3)*¹. It then conceded that the marriage had all the normal consequences of a marriage in community of property. In view hereof it pleaded three defences under the MPA i.e. sections 15(6), 15(9) and s17(5). In doing so the bank acted on advice it received which it accepted i.e. that to make the concession is in the interests of the matter and the interests of justice. I am of the view that this was correctly done.

[59] The executrix replied to this affidavit and specifically raised the defence that she did not consent to the deceased's loan agreement with the bank.

Legal Analysis

[60] Section 15(6) of the MPA reads as follows:

“(6) The provisions of paragraphs (b), (c), (f), (g) and (h) of subsection (2) do not apply where an act contemplated in those paragraphs is performed by a spouse in the ordinary course of his profession, trade or business.”

[61] With regard to the above defence she pleaded that there is a vast difference between funding a business venture and contracting in the ordinary course of one's business. She specifically states that the deceased was not acting in the ordinary course of his business when contracting with the bank.

¹ SA 365(KZD)

[62] For this reason she pleads that section 15(6) is of no avail to the bank. I can but agree. The proposition is in my view so trite that no authority is required.²

[63] Section 15(9) of the MPA stipulates that:

“9) When a spouse enters into a transaction with a person contrary to the provisions of subsection (2) or (3) of this section, or an order under section 16 (2), and-

(a) that person does not know and cannot reasonably know that the transaction is being entered into contrary to those provisions or that order, it is deemed that the transaction concerned has been entered into with the consent required in terms of the said subsection (2) or (3), or while the power concerned of the spouse has not been suspended, as the case may be;

(b) that spouse knows or ought reasonably to know that he will probably not obtain the consent required in terms of the said subsection (2) or (3), or that the power concerned has been suspended, as the case may be, and the joint estate suffers a loss as a result of that transaction, an adjustment shall be effected in favour of the other spouse upon the division of the joint estate.”

[64] The bank specifically pleads in its Supplementary Affidavit that in the circumstances of the case it could not reasonably be aware that the marriage was one of “*in community of property*” and that consent was required. The reasons the bank provides why it could not reasonably be aware are as follows:

61.1 The marital regime was never declared by as one of “*in community of property*” by the deceased or the executrix;

61.2 The default marital regime at the time was one of “*out of community of property*”;

61.3 The deceased had never declared the marriage to the bank at the time the loan application was made and granted. Due to the long lapse of time in the launching of the application there are no documents available relating to the loan. It pleads that from the documents relied upon by the executrix there was no indication that the marital regime was one of “*in community of*

² See however *Amalgamated Banks of South Africa Bpk v De Goede en 'n Ander* - 1997 (4) SA 66 (SCA) where the court dealt with a suretyship and the judgment in *Investec Bank Limited v Singh and another* [2024] JOL 65917 (GP) [2024] ZAGPPHC 690 (GP); where the court dealt with guarantees.

property” but rather the opposite. It then refers the court to the following documents:

61.3.1 The leasehold granted to the deceased annexure “**BMM 5**” to the founding affidavit which does not indicate any marital disposition. This is alleged to be relevant as the mortgage bond registered in favour of the bank was registered over the said leasehold as appears from the summons which is annexed marked “SFA 2” and in paragraph 1 of which the bond is referred to as being

“Mortgage Bond No BL5 1440/91 hypothecating as a First Mortgage all right , title and interest in and to the leasehold in respect of the property”;

61.3.2 The title deed in respect of the sale in execution annexed marked “**BMM6**” to the founding affidavit which describes the deceased as follows:

“MESCHACK HOWARD MOGUDI

IDENTITY NUMBER 5[...]

MARRIED BY VIRTUE OF SECTION 22(6) OF ACT 38 OF 1927

WHICH MARRIAGE DOES NOT HAVE THE LEGAL

CONSEQUENCE OF A MARRIAGE IN COMMUNITY OF PROPERTY”;

61.4 The bank pleads that it is common conveyancing practice that the description of *inter alia* the owner of the property be carried forward in successive documents without change. Thus the aforesaid description of the deceased would also have been as such in the original title deed, registered in the name of the deceased, and the mortgage bond registered in favour of the bank. (This is an assumption whilst the bank has no proof of a system that was in place as to how they would deal with marriages truly in community of property as opposed to black marriages in community of property where the usual consequences of same would not have followed as referred to in the 1927 Act).

[65] The bank thus submits that the loan agreement was valid at the time it was concluded between the deceased and the first respondent.

[66] To this the executrix pleads that the bank has no proof that there was no declaration of the marital regime and cannot rely on the contents of documents to confirm that no declaration was made and she in any event denies the content of

these paragraphs. She steadfastly maintains that she and the deceased were married in community of property with the normal consequences following thereon (which is now conceded by the bank).

[67] She also states that it is unlikely that the deceased would not have declared his true marital status when contracting with the bank. In addition she states that being a large financial institution one would have expected the bank's applications for loans and other services to include provision for a declaration. The executrix states expressly that either the bank is alleging that no such declaration was sought by it or that the deceased misstated the true state of affairs.

[68] The executrix unsurprisingly alleges that the bank knew or ought reasonably to have known that the deceased was married in community of property. Once it knew that the deceased was married, it should have taken positive steps to confirm the marital property status of such marriage. It makes no allegations that it did so.

[69] The executrix thus pleads that section 15(9) of the MPA does not apply or assist in the circumstances. As will later appear I am of the view that I can decide the matter on this issue. Although the executrix pleaded in this reply that she did not consent to the loan agreement with the bank I am of the view that section 14 of the MPA has the effect that such consent is unnecessary save in as much as such loan is tied to the security of a mortgage bond. (See paragraph 12 of the replying affidavit). I will revert to this defence below.

[70] The bank finally pleads that because of section 17(5) of the MPA the rescission application, be it under Rule 42(1)(a) or Rule 31(2)(b), cannot succeed only because the executrix was not cited.

[71] Sub-section 17 (5) of the MPA is part of a larger section 17 bearing the heading "**Litigation by or against spouses**". The complete section reads as follows:

"(1) A spouse married in community of property shall not without the written consent of the other spouse institute legal proceedings against another

person or defend legal proceedings instituted by another person, except legal proceedings-

- (a) in respect of his separate property;
- (b) for the recovery of damages, other than damages for patrimonial loss, by reason of the commission of a delict against him;
- (c) in respect of a matter relating to his profession, trade or business.

(2) A party to legal proceedings instituted or defended by a spouse may not challenge the validity of the proceedings on the ground of want of the consent required in terms of subsection (1).

(3) If costs are awarded against a spouse in legal proceedings instituted or defended by him without the consent required in terms of subsection (1), the court may, with due regard to the interest of the other spouse in the joint estate and the reason for the want of consent, order that those costs be recovered from the separate property, if any, of the first-mentioned spouse and, in so far as those costs cannot be so recovered, that they be recovered from the joint estate, in which case the court may order that upon the division of the joint estate an adjustment shall be effected in favour of the other spouse.

(4)(a) An application for the surrender of a joint estate shall be made by both spouses.

(b) An application for the sequestration of a joint estate shall be made against both spouses: Provided that no application for the sequestration of the estate of a debtor shall be dismissed on the ground that such debtor's estate is a joint estate if the applicant satisfies the court that despite reasonable steps taken by him he was unable to establish whether the debtor is married in community of property or the name and address of the spouse of the debtor.

[Sub-s. (4) substituted by s. 11 of Act 122 of 1993 (wef 1 September 1993).]

(5) Where a debt is recoverable from a joint estate, the spouse who incurred the debt or both spouses jointly may be sued therefor, and where a debt has been incurred for necessities for the joint household, the spouses may be sued jointly or severally therefor."

[72] The bank thus pleads in its Supplementary affidavit that it is common cause that the deceased incurred the debt and that the bank could thus decide who to sue for the debt, which it did by suing the deceased.

[73] The executrix in her reply hereto states that section 17(5) is inconsistent with the provisions of section 15 of the MPA. She pleads that the subject matter of this matter is not a “debt” within the ordinary meaning of the word. It is a mortgage bond over “immovable” which is specifically dealt with under section 15. She pleads that she in any event had a direct and substantial interest over the property and should have been cited and served. She goes on to plead that section 17(5) of the MPA is unconstitutional to the extent that it allows immovable property to be pledged or mortgaged and does not require that an affected spouse be joined to proceedings in relation to that property.

[74] The harm section 15(2) of the MPA is directed against does not relate to a debt in its ordinary meaning. It relates *inter alia* to the burdening of immovable property by a mortgage bond. Given that the mortgage bond is also the very instrument that enables the bank to obtain execution in respect of the property without first selling the debtor’s movables it is clear to me that to simply assume that the word “debt” in section 17(5) intends to cross-refer to the security rather than a “debt” would be wrong. Given the fact that section 15(2) makes no mention of a “debt” in the ordinary sense it is clear that section 17(5) has no bearing on section 15 (2). What section 17(5) probably has in mind is to leave the option to a creditor to sue in either parties’ name as far as a “debt” is concerned. This is to my mind the logical inference given that section 14 which uses the term “debt”, has bestowed on both parties married in community of property equal rights to incur debts. If the legislature wanted to deal with that which secures the debt it would have used the terminology set out in section 15(2).

[75] The following observation made about mortgage bonds and debts in *Standard Bank of South Africa Ltd v Saunderson and others*³ springs to mind:

³ See 2006(2) SA 264 (SCA) on p269 para 2

“The mortgage bond thus curtails the right of property at its root, and penetrates the right of ownership, for the bond-holder’s rights are fused into the title itself”

Although this observation was made in a different context it is an apt description of the effect of a mortgage bond and demonstrates that the use of the word “debt” can never be equated with the use of the word “mortgage”

[76] I should add that the point that section 17(5) is unconstitutional was correctly not proceeded with by Mr Mahon SC who appeared for the executrix. No rule 16A notice was delivered and in addition certain other relevant parties were not cited.

[77] The question remains whether the bank can rely on section 15(9)(a) as a defence in the sense that if it did not know and cannot reasonably know that the transaction entered into is in breach of section 15(2). The case law on this has been made clear by the SCA in *Marais and Another NNO v Maposa And others*.⁴

[78] The SCA held as follows:

“[26] The effect of s 15 may be summarised as follows. First, as a general rule, a spouse married in community of property 'may perform any juristic act in connection with the joint estate without the consent of the other spouse'. Secondly, there are exceptions to the general rule. In terms of ss 15(2) and (3), a spouse 'shall not' enter into any of the transactions listed in these subsections without the consent of the other spouse. Subject to what is said about the effect of s 15(9)(a), if a spouse does so, the transaction is unlawful, and is void and unenforceable. This, it seems to me, flows from what Innes CJ, in *Schierhout v Minister of Justice*, called a 'fundamental principle of our law', namely, that 'a thing done contrary to the direct prohibition of the law is void and of no effect'. Thirdly, if a listed transaction is entered into without the consent of the non-contracting spouse, that transaction will nonetheless be valid and enforceable if the third party did not know and could not reasonably have known of the lack of consent. While the consent requirement is designed to provide protection to the non-contracting spouse against maladministration

⁴ See 2020(5) SA 111 SCA

of the joint estate by the contracting spouse, the 'deemed consent' provision in s 15(9)(a) is intended to protect the interests of a bona fide third party who contracts with that spouse.

[27] Section 15 thus seeks to strike a balance between the interests of the non-consenting spouse, on the one hand, and the bona fide third party, on the other. Whether the legislature has struck an appropriate balance has been fiercely debated by academic writers, but is an issue that does not have to be engaged with in this judgment. In *Sishuba v Skweyiya and Another* the context in which s 15, and s 15(9)(a) in particular, is to be interpreted was set out as follows:

'These provisions seek to regulate marriages in community of property after the abolition of marital power. They must be interpreted and applied within this context — one in which "the restrictions which the marital power places on the capacity of a wife to contract and to litigate" have been abolished; in which "a wife in a marriage in community of property has the same powers with regard to the disposal of the assets of the joint estate, the contracting of debts that lie against the joint estate, and the management of the joint estate as those which a husband in such a marriage had immediately before the commencement of this Act"; and in which proper effect must be given to the fundamental right of everyone to equality before the law and the equal protection and benefit of the law.'

[28] A third party to a transaction contemplated by ss 15(2) or (3) that is entered into without the consent of the non-contracting spouse is required, in order for consent to be deemed and for the transaction to be enforceable, to establish two things: first, that he or she did not know that consent was lacking; and secondly, that he or she could not reasonably have known that consent had not been given. In terms of the general principle that the party who asserts a particular state of affairs is generally required to prove it, the burden of bringing s 15(9)(a) into play rests on the party seeking to rely on the validity of the transaction.

[29] The reference to reasonableness in the phrase 'cannot reasonably know' imports an objective standard into the proof of this element: it must be

established with reference to the standard of the reasonable person, in terms of what the reasonable person would do in the circumstances and the conclusion that the reasonable person would draw.

[30] In other words, a duty is placed on the party seeking to rely on deemed consent to make reasonable enquiries. Van Heerden et al say:

'Lack of actual knowledge on the part of the third party is a straightforward enough stipulation and capable of determination. But "cannot reasonably know" is more problematic. It must imply that the third party is under some sort of obligation to enquire about the status of the person with whom he or she is contracting. The third party is called upon, it is submitted, to take reasonable steps to ascertain whether the person with whom he or she is dealing is married and, if so, whether they have obtained whatever consent may be necessary for the particular transaction.'

The authors make the point that the third party may not do nothing, because then s 15(9)(a) would be meaningless. To put it at its lowest, the third party is 'put on enquiry'.

[31] The views of the academic writers are in harmony with the views expressed in various High Court judgments. For instance, in *Visser v Hull and Others*, Dlodlo J, after referring to the views of Steyn, held:

'I agree with Professor Steyn that a third party is expected to do more than rely upon a bold assurance by another party regarding his or her marital status. An adequate inquiry by the third party is required. If this proposition and interpretation of the liability of third parties is accepted, then it could be argued that the third parties in the case under consideration should have made the necessary inquiries into the current state of the applicant and the deceased's marital status.'

The same conclusion was reached in *Sishuba v Skweyiya and Another*, with reference to the views of Van Heerden, Cockrell & Keightley replicated in [30] above.

[32] I endorse the views expressed in the cases to which I have referred, as well as the views of the academic writers upon which they are based: a duty is

cast on a party seeking to rely on the deemed-consent provision of s 15(9)(a) to make the enquiries that a reasonable person would make in the circumstances as to whether the other contracting party is married, if so, in terms of which marriage regime, whether the consent of the non-contracting spouse is required and, if so, whether it has been given. Anything less than this duty of enquiry, carried out to the standard of the reasonable person, would render s 15(9)(a) a dead letter. It would not protect innocent spouses from the maladministration of the joint estate and would undermine the Matrimonial Property Act's purpose of promoting equality in marriages in community of property.”⁵

(I have excluded all references to footnotes in the above extract)

[79] Banks are in the business of granting loans secured by bonds. By 1993 the repressive apartheid regime was in its dying days and black persons were in the position of acquiring an interest in land in black townships and ultimately ownership. A bank which wanted to enter this market was in my view obliged to acquaint itself with the pitfalls of entering into mortgage bonds with black persons and should have made enquiries as to the true status of such a person's marriage. To simply raise the default position based on laws dealing with such persons as a defence is not enough. The mere fact that the legal possibility existed that a black person could be married in community of property with the normal consequences as opposed to the “default” consequences is not enough. The bank brought no evidence to the table to the effect that it embarked on a systematic approach to establish the true status of the deceased's marriage in this matter at the time the bond was granted.

[80] It blames the executrix and the deceased for raising the matter so late that by the time the bank is faced with the present matter it has no documentation pertaining to the relevant matters. If banks wish to destroy documents which could have protected them so be it. The attempt to rely on the “carry over” from the original documents reflecting the deceased's interest in the property and the subsequent title deeds is of no help. Banks who entered the field of financing of property sold to blacks and then sought security by way of a mortgage of the property should have

⁵ See para 26-32

taken cognisance of the MPA and the actual status of the deceased's marital status. A reasonable banker would in my view have done so when dealing with a white couple married in community of property and would in the ordinary course, cause the property and the bond to be registered in the names of such a couple jointly. Sole reliance on the fact that the "default position" of black marriages in community of property were different at the time is tantamount to conduct one's business recklessly or negligently. Given the admission finally made as to the marital status of the deceased at the time the loan and mortgage bond was granted, the bank to my mind has no defence at all. The attempt to shift the blame to the executrix and the deceased for delaying so long cannot cure what appears to be a transaction that was void from its inception.

[81] The bank's position is not enhanced by the acquisition of the property for an amount of R200 which has all the makings of a simulated transaction. In *Nxazonke v Absa Bank Limited*⁶ Davis J regarded such a transaction as a simulation in the absence of an explanation albeit in interim proceedings and an abuse of process. He held that same should not be permitted absent a clear and acceptable explanation. In addition it is clear that Court oversight was lacking as to the sale in execution. If the executrix's rights were acknowledged as it should have been at the time she would have been able to intervene in the execution process once she was made aware of it. She did not have knowledge prior to 2007 of the execution. Such a sale for a trifling amount was held to be an abuse of process by Davis J. Although I have no municipal valuation available to compare the price to, the amount secured by the bond i.e. R125 000 tells its own story. The bank provided no explanation at all for this abuse which resulted in the executrix (and the deceased's) right to the surplus after payment of the judgment debt being destroyed. It is no excuse to say that it no longer has any files relating to the execution.

[82] The practice to buy in properties at a low price during the earlier 1990's was rife and notoriously known. I believe so much so that I may take judicial cognisance thereof. I do not accept that the bank did not have access to witnesses (even if they are retired) who are unable to explain (even if it is only in general terms) how this

⁶ See 2012 JDR 2196 (WCC).

practice came into existence and why same prevailed at the time. If such witness was not prepared to co-operate the bank had remedies at its disposal to obtain such evidence.

[83] In the above matter the court found the starting point for the prima facie right to be the decision in *Jaffha v Schoeman & Others, Van Rooyen v Stoltz & Others*⁷ where the Constitutional Court held that an order which follows a default judgment declaring a property executable was unconstitutionally invalid when it was not made by a judicial officer, after taking into account all the relevant considerations, in particular whether the order sought would infringe the applicant's right of access to adequate housing under section 26(3) of the Constitution.

[84] In the present matter the socio-economic rights were not yet in place in terms of the Interim Constitution. These rights such as the right to adequate housing only came about once the 1996 Constitution was certified.⁸ I need not dwell upon this topic.

[85] The fact that the executrix and the deceased had no notice of the sale in execution (on their version) which is peremptory according to the decision in *Joosub v J I Case SA (Pty) Ltd (Now Known as Construction & Special Equipment Co (Pty) Ltd) and Others*⁹ is of some importance. The decision in *Knox NO v Mofokeng and Others*¹⁰ should also be borne in mind. In the latter matter the court was concerned with the rights of bona fide purchasers of property at sales in execution where the judgment under which the sale in execution was carried out was subsequently rescinded and the validity of the transfer of immovable property to a chain of successive (bona fide) purchasers. In such cases the abstract theory of passing of ownership comes into play.

⁷ See 2005(2) SA 140 (CC).

⁸ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC) p 800 para 76.

⁹ 1992 (2) SA 665 (N).

¹⁰ 2013(4) SA 46 (GSJ)

[86] This theory is explained as follows in *Legator v McKenna Inc. and Another v Shea and Others*¹¹:

“ In accordance with the abstract theory the requirements for the passing of ownership are twofold, namely delivery - which in the case of immovable property is effected by registration of transfer in the deeds office - coupled with a so-called real agreement or 'saaklike ooreenkoms'. The essential elements of the real agreement are an intention on the part of the transferor to transfer ownership and the intention of the transferee to become the owner of the property (see eg *Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstein en 'n Ander* 1980 (3) SA 917 (A) at 922E - F; *Dreyer and Another NNO v AXZS Industries (Pty) Ltd supra* at para 17). I Broadly stated, the principles applicable to agreements in general also apply to real agreements. Although the abstract theory does not require a valid underlying contract, eg sale, ownership will not pass - despite registration of transfer - if there is a defect in the real agreement (see eg *Preller and Others v Jordaan* 1956 (1) SA 483 (A) at 496; *Klerck NO v Van Zyl and Maritz NNO supra* at 274A - B; *Silberberg J and Schoeman op cit* at 79 - 80”¹²

[87] Given the paltry purchase price paid I have serious doubts as to whether the bank was a bona fide purchaser and could ever have passed ownership to Ms Tshenolo. Despite that there is in my view insufficient evidence to find that it was a simulated transaction or an abuse of process. I must also assume that Ms Tshenolo acted bona fide despite the fact that she bought more than one property from the bank as an employee. The error as to the date of the acquisition of the property is of no help as to whether she was a bona fide purchaser or not. The next question is whether the abstract theory of transfer of immovable property protects Ms Tshenolo against the absolute illegality of the mortgage bond which is the (illegal) instrument which permitted the sale of the property to the bank.

[88] In *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others*¹³ Tshongwe JA also dealt with the abstract system of transfer and said that:

¹¹ 2010(1) SA 35 (SCA).

¹² See para 22 on p 44 of the decision.

¹³ 2011 (2) SA 508 (SCA).

[12] It is trite that our law has adopted the abstract system of transfer as opposed to the causal system of transfer. Under the causal system of transfer, a valid cause (*iusta causa*) giving rise to the transfer is a *sine qua non* for the transfer of ownership. In other words, if the cause is invalid, eg non-compliance with formal requirements, the transfer of ownership will also be void — see Carey Miller 'Transfer of Ownership' in Feenstra & Zimmermann *Das Römisch-Holländische Recht* 537; 'Transfer of Ownership' in Zimmermann & Visser *Southern Cross: Civil Law and Common Law in South Africa* 727 at 735-9. Under the abstract system the most important point is that there is no need for a formally valid underlying transaction, provided that the parties are *ad idem* regarding the passing of ownership: *Meintjies NO v Coetzer and Others* 2010 (5) SA 186 (SCA).

[13] It is correct that registration of title in terms of the Deeds Registries Act 47 of 1937 is a brilliant system of public access to the register of owners of property and the registration of other protected rights such as servitudes. What is even more important is the correctness of the contents of the register. It is said that —

'(w)hen the Dutch settled in the Cape Colony they brought over from Holland this system of registration, and the titles to land granted by the governors were registered before the Commissioners of the Court of Justice. No sales of this land and no servitudes imposed thereon were recognised, unless these were registered against the title before the Commissioners.'

[89] The purposes are to publicise to the world and to protect registered owners — *Houtpoort Mining & Estate Syndicate Ltd v Jacobs* 1904 TS 105; and *Hollins v Registrar of Deeds* 1904 TS 603 and the cases cited therein. Even though there is no guarantee of title, the record needs to be accurate, though subject to correction. The record provides proof of the present registered owner of the property or right."

[90] Although the majority of the SCA bench disagreed with Tshongwe JA as to the issue of estoppel (which was not pleaded and thus do not arise in the present matter) the court accepted the applicability of the above.

[91] In my view the fact that section 15(2) leads to the mortgage bond being an absolute illegality Ms Tshenolo's rights of ownership cannot be rescued by the abstract theory of transfer of ownership.

[92] The question is on what basis should I rescind the judgment. Clearly the bank could not have transferred more rights that it had and neither did it obtain a valid judgment against the executrix given that it failed to cite her or obtained a valid judgment against her. She should have been joined.

[93] Leaving aside whether or not the executrix was wilfully absent an applicant must demonstrate that:

“.... but for the error he relies on, this Court could not have granted the impugned order. In other words, the error must be something this Court was not aware of at the time the order was made and which would have precluded the granting of the order in question, had the Court been aware of it.”¹⁴

[94] In *Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd* Streicher JA (and concurred in by the other members of the bench) held that:

“Similarly, in a case where a plaintiff is procedurally entitled to judgment in the absence of the defendant the judgment if granted cannot be said to have been granted erroneously in the light of a subsequently disclosed defence. A Court which grants a judgment by default like the judgments we are presently concerned with, does not grant the judgment on the basis that the defendant does not have a defence: it grants the judgment on the basis that the defendant has been notified of the plaintiff's claim as required by the Rules, that the defendant, not having given notice of an intention to defend, is not defending the matter and that the plaintiff is in terms of the Rules entitled to the order sought. The existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a

¹⁴ See *Daniel v President of the Republic of South Africa* 2013 JDR 1439 (CC) para 6.

validly obtained judgment into an erroneous judgment”¹⁵

[95] The above extract was relied upon by Khampepe J writing for the Court in *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State*¹⁶ I have also considered the decision in *Naude v Wright*¹⁷ I am not entirely persuaded that it is on all fours with the facts in this matter given the final findings with regard to section 15(2) of the MPA.

[96] In the present matter the applicant on my finding above had a vital interest in the outcome of the proceedings and should have been joined. In this sense and although the error is not on record, now that a court is aware of it, it is clearly erroneously granted. I am thus inclined to grant relief in terms of rule 42(1)(a).¹⁸

[97] In the alternative and should the above not be a case of a judgment being erroneously granted it appears to me that rule 31(2)(b) may well be of use given the fact that good cause have been demonstrated and in my view an acceptable explanation for the delay has been provided. In any event irrespective of the delay the absolute illegality and voidness that ensues in the present circumstances points towards the need for condonation being granted.

[98] I am persuaded that the judgment should be rescinded and consequential relief should be granted based on such rescission. The executrix seeks an order to the effect that the property be transferred in her name. Counsel for the bank correctly pointed out that such property should be treated as an asset in the deceased estate and on that basis, given that the deceased left no will, the property should be subject to the laws of intestate succession in which case the executrix only stands to inherit a child's portion. I am not seized with the administration of the estate, but the point is well made.

¹⁵ See 2007 (6) SA 87 (SCA) para 27.

¹⁶ See 2021 JDR 2069 (CC) para 63.

¹⁷ See 2017 JDR 1418 (GP).

¹⁸ See Erasmus Superior Court Practice discussion of this rule on RS 25,2024,D1 Rule 42-18-19 and *Clegg v Priestley* 1985(3) SA 950 (W).

[99] Adv Mahon S.C., despite this argument, persisted in the original relief. In my view the following is clear. Due to the illegality the bank acquired no rights from the tainted transaction and could pass no rights to Ms Tshenolo. She was cited as an interested party but did not participate in the present litigation. I assume that as between the bank and herself the consequences of my judgment will be reckoned with. I am not seized with these issues..

[100] I am satisfied that the executrix is entitled to vindicate the property on the basis of my finding from Ms Tshenolo. The fact that the executrix should ultimately deal with the property as an asset in the estate can be provided for in my order. The property should however be vindicated soonest before any other purchasers become involved.

[101] All the potential heirs in any event live together with the executrix.

[102] In all the circumstances I make the following order:

1. Condonation for the late filing of this application is granted to the extent necessary;
- 2 The judgement in Case Number 31834/1993 granted by Cloete J on 18 January 1994 in favour of the first respondent is hereby rescinded and set aside including the order declaring the property executable;
- 3 Pending the finalisation of the deceased's estate the applicant is declared the lawful owner of the immovable property located at Erf 1[...], O[...] W[...], bearing physical address 1[...] M[...] Street, M[...], O[...], D[...], Soweto ("the property");
- 4 The third respondent is directed to forthwith do all things necessary to re-register and transfer the property into the name of the applicant;
- 5 The applicant is directed to administer the aforesaid property as part of the deceased's estate in terms of the law of intestate succession to the satisfaction of all the deceased's heirs.
- 6 The first respondent is directed to pay the applicant's costs on scale C such costs to include the use of one senior counsel and one junior counsel.

S VAN NIEUWENHUIZEN

**ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG**

Date judgment reserved: 27 November 2024

Date judgment delivered: 21 May 2025

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